IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No CR-18-01135

DIRECTOR OF PUBLIC PROSECUTIONS

v

HUSSEIN ZAPHIR

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Melbourne
DATE OF HEARING:	10 February 2020
DATE OF SENTENCE:	4 November 2020
CASE MAY BE CITED AS:	DPP v Zaphir
MEDIUM NEUTRAL CITATION:	[2020] VCC 1746

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW – Sentencing.
Catchwords:	Plea of guilty – Obtain financial advantage by deception – Attempt to obtain financial advantage by deception – Prohibited person in possession of firearm – Offender made unlawful purchases purporting to be the credit hard holders – Offender obtained total financial advantage of $161,511.95 – Serious example of offending – Offender on bail at time of offending – Prior criminal history – Delay since offending and plea hearing – Very strong prospects of rehabilitation – Circumstances surrounding COVID-19 taken into account.
Legislation Cited:	*Crimes Act 1958* ss 82, 121M; *Firearms Act 1996* s 5; *Control of Weapons Act 1990* s 5A; *Bail Act 1977* s 30B; *Sentencing Act 1991* ss 6AAA, 18.
Cases Cited:	*R v Merrett* (2007) 14 VR 392.
Sentence:	Imprisonment for a period of 6 months.

APPEARANCES:	Counsel	Solicitors
For the DPP	Mr A Sharp (plea) Ms G McMaster (sentence)	Office of Public Prosecutions
For the Accused	Mr P Dunn QC (plea)	Kaczmarek Grigor Lawyers

Ms A Kaczmarek (sentence)

HIS HONOUR:

Introduction

1 Hussein Zaphir, you have pleaded guilty to the following charges:

- One charge of obtain financial advantage by deception contrary to s 82(1) of the *Crimes Act 1958*, which carries a maximum penalty of 10 years imprisonment (Charge 1);
- One charge of attempting to obtain financial advantage by deception contrary to ss 82(1) and 121M of the *Crimes Act 1958*, which carries a maximum penalty of 5 years imprisonment (Charge 2); and
- One charge of being a prohibited person in possession of a firearm contrary to s 5(1) of the *Firearms Act 1996*, which carries a maximum penalty of 10 years imprisonment (Charge 3).

2 You have also pleaded guilty to the following related summary charges:

- Charge 22, possessing a prohibited weapon without exemption contrary to s 5AA of the *Control of Weapons Act 1990* which carries a maximum penalty of 2 years imprisonment; and
- Charge 23, commit an indictable offence whilst on bail contrary to s 30B of the *Bail Act 1977* which carries a maximum penalty of three months imprisonment or 30 penalty units.

3 You have also admitted your prior criminal record.

Circumstances of the offending

4 A prosecution opening was tendered on the plea and may be summarised as

follows:

5 Between 21 October 2014 and 23 November 2014, you went on a spending spree in Melbourne using three American Express credit cards that you acquired the possession of. Those cards were in the names of:

- Paul Norbury, being American Express card number 3760 019954 12008;
- David Nichols, being American Express card number 3760 112219 14008; and
- George Piazza, being American Express card number 3760 109160 22002.

6 You conducted 18 transactions at various retail stores. Fourteen of those transactions were successful which relate to Charge 1, and four were not successful which relate to Charge 2.

7 The deception in relation to each charge is that when you used the American Express credit card, you purported that you were the person named on the card and were authorised to use that card.

8 As a result of the deceptions the following amounts were obtained on each of the three cards:

- American Express card number 3760 019954 12008, in the name of Mr Norbury, a total value of $55,682.50;
- American Express card number 3760 112219 14008, in the name of Mr Nichols, a total value of $41,400.00; and
- American Express card number 3710 10918022 002 in the name of Mr

Piazza, a total value of $64,429.45, and three further attempts at a total value of $11,573.08.

9 The individual transactions that are represented by Charges 1 and 2 are detailed in the prosecution summary and in the schedules attached to the charges. As such I will not recite the individual transactions in these sentencing reasons. The transactions in relation to the card belonging to Mr Norbury occurred on 21 October 2014. The transactions in relation to the card belonging to Mr Nichols occurred on 23 October 2014. The transactions relating to the card belonging to Mr Piazza occurred between 21 November 2014 and 23 November 2014.

10 The transactions, both successful and unsuccessful, related to purchases of jewellery and what appears to be purchases from appliance or department stores.

11 The total sum of the financial advantage you obtained is $161,511.95.

12 The total sum of the financial advantage you attempted to obtain is $11,573.08.

13 On 20 September 2017 police attended Unit 7, 8 New Street, Armadale in Victoria and executed a search warrant. As the police gained entry you ran onto a balcony at the premises and tried to climb over the balcony. You were stopped by police.

14 You were seen throwing an object into a garden bed. Police searched the area and found a loaded handgun. At the time you possessed the handgun you were a prohibited person for the purpose of the *Firearms Act 1996*. It is

these facts that relate to Charge 3, prohibited person in possession of a firearm.

15 Police searched your address and located, among other items, body armour. It is these facts that relate to Summary Charge 22, possess prohibited weapon without exemption.

16 On 12 August 2017, you were arrested in relation to an unrelated matter and placed on bail. It is these facts that relate to Summary Charge 23, commit an indictable offence whilst on bail, the indictable offence being Charge 3 on the indictment.

17 In an interview with police regarding the handgun recovered from the garden bed, you made full admissions to possessing the handgun and placing it in the garden bed.

Nature and gravity of the offending

18 The deception offences to which you have pleaded guilty represent a series of transactions that occurred over approximately a four week period in October and November 2014. While I have been provided some explanation as to how you came into possession of the three credit cards, what is clear is that over that four week period you unlawfully used those cards to purchase items to the value of $161,511.95 and attempted to purchase items to the value of $11,573.08. The offences were bold and audacious with some single purchases made to the value of tens of thousands of dollars.

19 It was explained on the plea that you were asked to use the cards in order to obtain money for someone else. Your reward was that you were paid in drugs

as you were at the time, in the grip of a significant and long term drug addiction. It was said that after a period, you realised that the explanation given to you in relation to the cards was not true. While I have trouble accepting your explanations in relation to how you came to use the cards, I do accept that when struggling with a serious drug addiction, people respond in ways that do not necessarily follow a clear line of logic and are desperate to fuel their habit.

20 Mr Sharp who appeared on behalf the Director of Public Prosecutions submitted that the offending is serious given the quantum involved. I agree.

21 In the circumstances in my view your conduct represents a serious example of obtaining or attempting to obtain property or financial advantage by deception. While it is not alleged that you stole the cards, you were well aware that you were in possession of credit cards belonging to others and by your plea, you accept that you had no right to use those cards. I also note that none of the money has been recovered.

22 As to the charge of being in possession of the handgun, which occurred in 2017, I was told that this was an antique firearm that you had in your possession due to a longstanding fear you had after your two school friends were murdered in 2006, and following a more recent event where your employer's business was shot at.

23 You have a prior conviction for using an unregistered handgun and as such you were a prohibited person at the time of this offending which makes the offending inherently serious. The seriousness of the offence is further aggravated by the fact that you were on bail at the time of the offending.

Personal circumstances

24 You are 39 years of age. You live in Sydney however you lived in Melbourne from approximately 2007 to 2019.

25 You originally came to Australia from Tripoli, Lebanon in 1976 with your family in order to avoid the Lebanese civil war. You arrived in Sydney as refugees.

26 Your father was a factory worker and is now on a pension. Your mother performs home duties. You are the eldest of five children. Your younger siblings are all married with children and no member of your family has ever been in trouble with the police.

27 You attended government schools in Granville and after completing Year 10 you attended Granville TAFE in order to study business. You then worked in various employment including in kitchen restoration and cabinet making.

28 In 2004, when you were in your early twenties, you began to use drugs and in 2005 you were using heroin. In one report tendered, you disclosed to the writer that you were smoking half a gram of heroin daily from the age of 24 to 37 and inhaling one gram of cocaine most days from the age of 25 to 37.

29 In 2006, two of your close school friends were shot and killed in your presence. Understandably, you were greatly affected by this incident. You stopped working and in 2007, you changed your name and moved to Melbourne in order get away from the scene you were in. However, you continued to use drugs and alcohol.

30 From 2010 to 2012 you were buying and selling cars while you continued to use drugs. In April 2012, you were convicted in the Magistrates' Court in

relation to trafficking heroin, trafficking amphetamine and using an unregistered handgun. You received a suspended sentence in relation to the handgun and trafficking charges and a community correction order in relation to the more minor charges.

31 In July 2012, before completing the community correction order, you were given permission to travel to Lebanon to visit your father who was very ill. You stayed in Lebanon and did not return to complete the community correction order.

32 You returned to Melbourne in 2013, continued to work in the car industry and continued to use drugs. In 2014 you became involved in the credit card offending.

33 In 2015, you began a new relationship with a person who was in stable employment and not using drugs and it was submitted, was a good influence on you. Despite this, you continued your drug use.

34 In 2017, your employer was threatened and the premises where you worked were shot at. In August 2017, you were arrested in relation to possession of a firearm in the car you were driving. It is alleged that you sought to attribute ownership of the firearm to a colleague and as such you were charged with being a prohibited person in possession of a firearm and attempting to pervert the course of justice. Those charges are awaiting trial.

35 Some 18 days later, on 20 September 2017, a search warrant was executed at your home and you were charged with the current offences.

36 A number of reports and medical documentation were tendered on the plea.

Much of the material was prepared for your bail application in December of 2017. A report was prepared by consultant psychiatrist, Dr Anthony Cidoni. While Dr Cidoni was only able to assess you via a video link in custody, he was of the view that you displayed symptoms of post traumatic stress disorder and a significant polysubstance use disorder. Given your history, these observations are not surprising.

37 In January 2018, you completed a one month inpatient drug rehabilitation program at Bayside Private and then returned to live with your girlfriend with a condition that you continue regular drug counselling including urine screens. You then continued drug and alcohol counselling with Denise Abadee on a weekly basis for the next 12 months.

38 In mid 2018, your relationship with your girlfriend broke down and in October 2018 you returned to court on a breach of the community correction order you received in 2012. You were placed on a further order which included further drug treatment and community work. You completed that order.

39 In May of 2019, you were permitted to travel to NSW and ultimately in October 2019, you moved permanently to Sydney to live with your family. You commenced a new relationship and in January 2020, you were married. Your new partner has a young child and you have taken on the responsibilities of a stepfather. You obtained full time employment working on the National Broadband Network roll out as a site supervisor.

40 I received a number of references from people that represent a wide cross section of your life. Each of the writers speak of the change they have observed in you over the past couple of years. All references share the same

view that when you are not under the influence of drugs, you are otherwise a hardworking, respectful, trustworthy and loyal person. Your employer used the same terms to describe you as an employee. Your new wife speaks of the dedication you have towards her and her young son now that you have a new role as a husband and stepfather.

Delay following plea hearing

41 Since the hearing of this plea in February this year, the matter was delayed for two main reasons. First, time was provided to the parties to see if the outstanding trial matter was able to be resolved. That resulted in a number of delays including time for you to obtain a DNA report. Ultimately, the matter did not resolve. Secondly, the delay related to your medical vulnerabilities in the context of the COVID-19 pandemic. While documents were tendered on the plea providing background in relation to a number of medical issues you have been suffering over the years, some of those medical conditions became more relevant and have contributed to the delay.

42 Documents were tendered demonstrating that in February 2018 you were diagnosed with rhabdomyolysis which is described as muscle tissue breakdown. This resulted in treatment as an inpatient. In March 2018 you were again admitted to hospital diagnosed with pulmonary oedema.

43 Following the plea hearing, the impact of the pandemic restricted travel and caused fear in relation to people with medical vulnerabilities. A letter was filed from your local general practitioner Dr Noah Diner, dated 30 July 2020, where he states that 'the current active issues result in him having a degree of immunocompromise which render him at higher risk of significant ill health

should he contract infections such as COVID-19.'

44 Your local general practitioner in Sydney, Dr Sayed Haideri, wrote a letter in similar terms also confirming your vulnerabilities if you were to contract the virus and advised against travel to Melbourne.

45 On 30 July 2020, you were notified that you were in a Sydney restaurant at a time when there had been a positive case of COVID-19 and were required to self-isolate for 14 days.

46 At a mention of this matter on 13 October 2020, it was submitted on your behalf that sentencing should be further deferred pursuant to s 83A of the *Sentencing Act 1991* primarily as a result of the ongoing pandemic and the associated risk factors you face. An updated letter from Dr Diner dated 8 October 2020 was relied on. Dr Diner essentially repeats his previous opinion that on the basis of your multiple co-morbidities, you should remain in NSW because of what he refers to as 'the ongoing COVID issues in Victoria.'

47 While I accept that your medical conditions do make you more vulnerable, the situation in Victoria has vastly improved since Dr Diner's letter of 30 July when the second wave of the pandemic in Victoria was at its peak. As such while the concern and stresses you face are genuine matters to be taken into account, in my view as this matter has been delayed some 10 months already since the plea hearing, at the mention on 13 October, I refused your application to defer sentencing further.

48 I do however take into account that during the period of delay you have continued your rehabilitation, you have not reoffended, and you remain settled

in your new relationship. You are also engaged in employment, working part time from home.

Sentencing considerations

49 Mr Dunn QC, who appeared on your behalf, highlighted a number of matters in mitigation. First, I take into account your plea of guilty. The plea cannot be considered an early plea as it was entered at the time your trial was in the reserve list. That said, the plea still has utilitarian benefit. It has saved the time and expense of a trial and demonstrates your willingness to facilitate the course of justice.

50 As to genuine remorse, while the references state that you are remorseful, in my view there is little evidence that demonstrates true remorse in relation to the offending. I have no doubt that you are ashamed in relation to the pain you have caused your family and friends who have continued to support you, however there is no evidence where you acknowledge the harm that gun culture has caused in our community – in circumstances where you yourself have experienced firsthand the loss of two friends as a result of gun violence and have a prior conviction for possession of a firearm.

51 It was submitted that delay has relevance in the circumstances. The deception offences occurred in 2014 and the weapon charge in 2017. It was submitted that delay in the circumstances is relevant in the sense that in the time between the offending and now, you have demonstrated a sustained period of rehabilitation as outlined above. Based on the evidence of your rehabilitation over the past two years, I accept that delay in the circumstances

is a matter to be taken into account in your favour.[1] Since the plea hearing there is now a further period of some 10 months' delay which has not been attributable to you, where you have continued your rehabilitation and remain settled.

52 A large component of the submissions put on your behalf focused on the steps you have taken to rehabilitate yourself since your release on bail in December 2017. As noted above, you have engaged in extensive drug rehabilitation and you have completed a further community correction order. Further, you have recently married and are settling in Sydney with family support. You have also been in employment since your release on bail. In all the circumstances, while drug rehabilitation is a long process, in my view your prospects of rehabilitation are able to be assessed as very strong.

53 It is clear that in relation to the deception offences and the firearm offence, general deterrence must carry significant weight in the sentencing discretion. Further, in relation to the firearm offence, which was committed while you were on bail and as you have a prior conviction for using a handgun and were therefore a prohibited person, specific deterrence must also carry weight. As was submitted by Mr Sharp, you said that you had the loaded firearm for 'defensive purposes', indicating that you were prepared to use the weapon.

54 Mr Dunn submitted that a community correction order in the circumstances would be an appropriate disposition to allow you to ultimately transfer the order to NSW. In the alternative, a combination order was sought, taking into account the time you have spent on remand. I had you assessed for a

1 *R v Merrett* (2007) 14 VR 392 at [36]-[39].

community correction order in February following the plea and you were assessed as suitable. As a result of the delay, I had you reassessed on 7 October 2020. The same assessor formed the view that as a consequence of your ongoing rehabilitation and the supports you have in place, you are a low risk of reoffending. As such any treatment and rehabilitation conditions were now not deemed appropriate. Further, as a result of the pandemic, unpaid community work is not able to be conducted and the transfer of orders to NSW has ceased. In the circumstances you were found not suitable for a community correction order. While this is the view of the corrections officer, it does not bind the court in making an order if deemed appropriate. However, in my view I concur with the writer of the report that you have continued to show insight into your offending and the period of the delay since the plea provides further evidence of your positive rehabilitation.

55 While your sustained rehabilitation carries significant weight in the sentencing process, the offences to which you have pleaded guilty are serious offences and, in my view, require a further period of imprisonment in order to meet the relevant sentencing considerations. As noted, I have taken into account the difficulties you will face as you will be required to be in Victoria to complete the sentence I will impose, while your support networks remain in NSW. However, as I am imposing a straight sentence this will give you some certainty of your release date and your return to NSW to continue your rehabilitation.

56 Finally, I take into account the circumstances surrounding the COVID-19 pandemic. It is well settled that the pandemic has imposed greater burdens

on prisoners and their families. Physical visits to prisons are not permitted, prisoners experience greater periods of lockdown and many programs have been restricted. In your case, as you will be entering prison today, you will be subject to a 14 day quarantine period and possibly a further period of quarantine if you are transferred to another prison. Further, the burden you already face whilst being in prison in Victoria away from your support network will be further exacerbated as a result of the restrictions. I take these matters into account.

Sentence

57 Mr Zaphir please stand.

58 Hussein Zaphir, on Charge 1, obtaining financial advantage by deception, you will be convicted and sentenced to 4 months imprisonment.

59 In relation to Charge 2, attempting to obtain financial advantage by deception, you will be convicted and sentenced to 2 months imprisonment.

60 In relation to Charge 3, being a prohibited person in possession of a firearm, you will be convicted and sentenced to 5 months imprisonment.

61 On Summary Charge 22, possessing a prohibited weapon without exemption, you will be convicted and sentenced to 1 month imprisonment.

62 On Summary Charge 23, commit an indictable offence whilst on bail, you will be convicted and sentenced to one month imprisonment.

63 I direct that one month of the sentence on Charge 1 be served cumulatively on Charge 3. That makes for a total effective sentence of 6 months

imprisonment.

64 Pursuant to s 18 of the *Sentencing Act 1991*, I declare that 73 days be reckoned as the period of imprisonment already served under the sentence I have imposed. That does not include today.

65 Pursuant to s 6AAA of the *Sentencing Act 1991*, I indicate that had you not pleaded guilty, I would have sentenced you to a period of 14 months imprisonment.

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